No. 15-105

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLO., ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE ORTHODOX JEWISH RABBIS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Rabbi Mitchell Rocklin is a member of the Executive Committee of the Rabbinical Council of America ("RCA"), the largest organization of rabbis in the United States. He has experience as a congregational rabbi and a U.S. Army Reserve chaplain. As a chaplain tending to practitioners of diverse faiths, he has witnessed a wide variety of sincerely held religious beliefs and the profound importance many Americans place on their observance. He recognizes the necessity of protecting all such beliefs.

Rabbi Steven Pruzansky is the spiritual leader of Congregation Bnai Yeshurun, a synagogue consisting of nearly 600 families in Teaneck, New Jersey. He has served as a Vice President of the RCA.

Rabbi Dov Fischer is the spiritual leader of a synagogue in Irvine, California. He is a member of the Executive Committee of the RCA.

These amici maintain that while the Tenth Circuit's interpretation of the Religious Freedom Restoration Act ("RFRA") risks curtailing every American's religious liberty, it poses a heightened risk to practitioners of minority religions such as Orthodox Judaism. They are concerned with protecting the religious

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[1] Pursuant to SUP. CT. R. 37.2(a), amici certify that counsel of record received timely notice of the intent to file this brief and granted consent. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party has authored this brief in whole or in part, no party or party's counsel has made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel has made such a monetary contribution.

liberty of their congregants as well as religious adherents nationwide.

SUMMARY OF ARGUMENT

The Tenth Circuit's opinion below dramatically narrowed religious liberty protections—particularly for minority religious adherents such as Orthodox Jews. The court effectively negated this Court's *Hobby Lobby* decision by asking whether the plaintiffs properly understood their own sincerely held religious beliefs—a "question that the federal courts have no business addressing . . . ." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

The court refused to protect the Little Sisters' religious liberty, because it found their explanations regarding the nature and significance of their religious beliefs "unconvincing." *Little Sisters of the Poor Home for the Aged, Denver, Colo., v. Burwell*, 2015 WL 4232096, at *29 (10th Cir. July 14, 2015). If this rule is allowed to stand, religious minorities whose religious practices are not widely known or understood will be the most negatively affected. This Court should grant certiorari and reverse the Tenth Circuit's decision in order to ensure that RFRA continues to protect all sincerely held religious beliefs, including those of religious minorities.

RFRA was intended to "provide very broad protection for religious liberty," *Hobby Lobby*, 134 S. Ct. 2751 at 2760, and to apply in "all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb. The statute prohibits the government from substantially burdening a religious adherent's religious exercise unless doing so is necessary to further

a compelling government interest. 42 U.S.C. § 2000bb-1.

RFRA neither requires nor allows courts to second-guess religious adherents' sincerely held religious beliefs. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. 2751 at 2777–79 ("it is not for us to say that their religious beliefs are mistaken or insubstantial"). A court's role in determining whether a law substantially burdens religious exercise is limited to determining whether the consequences a religious adherent faces for violating the law are significant. *Id.* at 2779. In evaluating and ultimately rejecting the petitioners' claim that complying with the Health and Human Services Accommodation would substantially burden their religious exercise, the Tenth Circuit deviated from this precedent and significantly narrowed RFRA's protection.

There are compelling reasons to grant certiorari and authoritatively resolve the issues presented by this case that are of particular importance to amici as leaders in the Orthodox Jewish community. Orthodox Jews are a minority within a minority in America. Many Americans, including judges, are not familiar with their religious practices. For Orthodox Jews, writing, cooking, traveling a great distance, or using electricity on the Sabbath; creating hybrid plants or animals; wearing a garment made from both wool and linen; shaving with a razor; or cutting one's sideburns too short can constitute sinful behavior.

A rule requiring public-school students or prisoners to wear uniforms containing a wool-linen blend would substantially burden an Orthodox Jew's religious exercise. Under the Tenth Circuit's approach, a judge unacquainted with Orthodox Jewish practice

might wrongly conclude that requiring a religious individual to wear a particular shirt only imposes a slight burden on religious exercise and deny a RFRA accommodation. Such an outcome would be inconsistent with RFRA's plain text, this Court's precedent, and Congress's intent to protect religious minorities.

The Tenth Circuit maintained that, rather than second-guessing the petitioners' sincerely held religious beliefs, it was rejecting their understanding of the interaction between those beliefs and the Accommodation. *Little Sisters*, 2015 WL 4232096, at *19. This is a distinction without a difference.

The court concluded that, when properly understood, the Accommodation did not substantially burden the plaintiffs' religious beliefs. In order to reach that conclusion, the court necessarily made determinations regarding both the Accommodation and the petitioners' religious beliefs. Without reaching conclusions regarding both items, a court could not possibly determine how substantially they interacted with one another.

The allegedly limited nature of the requirements imposed by the Health and Human Services Accommodation may help the government carry its burden of proving that the law is necessary to further a compelling government interest, 42 U.S.C. § 2000bb-1(b), but it should not allow the Accommodation to avoid scrutiny entirely.

ARGUMENT

I. As a Minority Within a Minority, Orthodox Jews Will Experience Deprivations of Their Religious Liberty If Judges Are Empowered To Second-Guess Their Sincerely Held Religious Beliefs.

Approximately 6.7 million Jewish people live in the United States. Luis Lugo et al., *A Portrait of Jewish Americans: Findings from a Pew Research Center Survey of U.S. Jews* at 25 (Oct. 1, 2013), *available at* goo.gl/eQlgU9 (last visited August 18, 2015). Only ten percent of those 6.7 million, or around 670,000, belong to the Orthodox denomination. *Id.* at 10.

Orthodox Jews adhere to religious stringencies that are unfamiliar to most Americans, including many Jews belonging to other denominations, and such practices might appear trivial or insubstantial to a religious outsider. Those seemingly inconsequential practices play an essential role in the religious life and identity of Orthodox Jews.

It is understandable and predictable that judges would lack expertise regarding Orthodox Jews' religious obligations. During a recent oral argument, a judge on the Fifth Circuit chose turning "on a light switch every day" as a prime example of an activity that was unlikely to constitute a substantial burden on someone's religious exercise. Oral Argument at 1:00:00, *East Texas Baptist Univ. v. Burwell*, 2015 WL 3852811 (5th Cir. Apr. 7, 2015), *available at* goo.gl/L50Gt1. To an Orthodox Jew, turning on a light bulb on the Sabbath could constitute a violation of a biblical prohibition found in Exodus 35:3.

That a judge, in attempting to find an activity that no one would find religiously objectionable, inadvertently selected an activity which could constitute a grave sin for an Orthodox Jew, exemplifies how ill-equipped judges are to adjudicate questions of religious belief. This highlights the harm likely to befall Orthodox Jews and other practitioners of minority religions if judges are tasked with undertaking such inquiries.

Many similar examples, in which judges would be poorly positioned to weigh the importance of an Orthodox Jewish practice, could arise. Orthodox Jews consider wearing a garment made from both wool and linen a serious biblical violation. To avoid transgressing this prohibition, Orthodox Jews check labels and sometimes send clothes to specialists who can determine if even a small amount of both materials is present. *E.g.*, *Shatnez-Free Clothing*, CHABAD.ORG, goo.gl/RZRcSm (last visited Aug. 13, 2015). A rule requiring Orthodox Jewish public-school students or prisoners to wear clothing containing a tiny amount of wool and linen may seem innocuous, but it would substantially burden their religious exercise.

Orthodox Jews also observe strict requirements regarding shaving. They believe that it is forbidden to shave one's face with a razor blade or to trim one's side-burns shorter than a certain length. *See* Leviticus 19:27. The Jewish philosopher Maimonides explained that these prohibitions are related to avoiding idolatrous practices. *E.g.*, Eli Touger, *The Prohibition Against Shaving the Edges of One's Head*, CHABAD.ORG, *available at* goo.gl/N2Te11 (last visited Aug. 16, 2015). Orthodox Jews have sought and received

exemptions from rules relating to shaving. *E.g.*, *Litzman v. NYPD*, 2013 WL 6049066 (S.D.N.Y. Nov. 15, 2013) (exempting Orthodox Jewish police officer from the New York Police Department's shaving policy).

Numerous everyday activities such as writing, cooking, or driving a car constitute a desecration of the Sabbath according to Orthodox Jewish practice. In fact, picking flowers, removing bones from fish, and gathering sticks in an open field may each qualify as a violation of the fourth of the Ten Commandments. In biblical times, such a violation merited the death penalty. Numbers 15:32–36. It is unreasonable to ask judges who are unlikely to share, or even be aware of, these beliefs to weigh the substantiality of the burdens placed upon sincere religious believers.

Orthodox Jews have historically felt at home in America, because its robust protections for religious liberty have never discriminated against minority practices. The Tenth Circuit's ruling is incompatible with that admirable history, risks limiting the guarantee of religious liberty only to the most well-known and well-accepted religious practices, and risks making America a less tolerant and less welcoming nation.

II. This Court Should Grant Certiorari To Reaffirm Its Prior Holdings and Clarify That Determining Whether a Law Places a Substantial Burden on Religious Exercise Does Not Require Judges To Question Religious Practitioners' Sincerely Held Beliefs.

A. The Religious Freedom Restoration Act Protects All Religious Exercise, No Matter How Obscure.

The Religious Freedom Restoration Act (RFRA) was intended to "provide very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2760. This understanding is consistent with the text of the statute as well as Supreme Court precedent. *See, e.g., id.*

The statute's "declaration of purposes" expresses Congress's desire that "governments should not substantially burden religious exercise without compelling justification." 42 U.S.C. § 2000bb. The statute indicates that it applies "in all cases where free exercise of religion is substantially burdened." *Id.* In order to ensure that the statute would protect even the most obscure or idiosyncratic religious practices, Congress defined "exercise of religion" to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5. Congress further instructed that this language "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* § 2000cc-3(g). RFRA's text requires that the government refrain from substantially burdening any religious exercise, rather than a privileged few, unless it can demonstrate a compelling justification. *Id.* § 2000bb-1.

The Tenth Circuit's opinion below undermines RFRA's broad sweep by limiting its coverage to those religious exercises that judges deem substantial enough to protect. Unpopular or minority beliefs, the ones most likely to need protection from majoritarian impulses, are the beliefs most likely to be left unprotected under such a standard.

B. Contrary To the Tenth Circuit's Holding, Congress Did Not Authorize Judges To Rule on the Validity of an Adherent's Understanding of His Own Religious Practices.

The Tenth Circuit mistakenly determined that RFRA empowers courts, rather than religious adherents, to determine the compatibility between a law and a religious exercise. *Little Sisters*, 2015 WL 4232096, at *18. Under this interpretation, if a court determines that a plaintiff has misunderstood the substantiality of his own religious beliefs, the government is excused from showing a compelling justification for its rule. Such a determination is indistinguishable from determining the validity of a religious belief.

The Tenth Circuit then determined that the plaintiffs were mistaken in their sincere belief that complying with the Health and Human Services ("HHS") Accommodation would render them religiously complicit with sinful behavior or would otherwise substantially burden their religious exercise. *Id.* at *20–*21, *29–*31. The court therefore refused to investigate whether the government presented a compelling justification for refusing to exempt the Little Sisters from the HHS Accommodation. *Id.* at *32. An understanding of RFRA that could lead to such a result is unworkable and plainly wrong.

i. In Order To Determine Whether a Law Imposes a Substantial Burden on Religious Exercise, Courts Should Examine the Burden Imposed on Adherents Who Refuse To Follow the Law Rather Than Attempt To Adjudicate Religious Beliefs.

In the *Hobby Lobby* case, this Court rejected an argument indistinguishable from the argument adopted by the Tenth Circuit below. 134 S. Ct. at 2777–79. In that case, the government argued that the "the connection between what the objecting parties must do . . . and the end they find morally wrong . . . is simply too attenuated" to constitute a substantial burden. This Court rejected that argument and refused to "tell the plaintiffs that their beliefs are flawed," describing the inquiry proposed by the government as a "question that the federal courts have no business addressing . . . ." *Id.* at 2778.

As this Court noted, in order to establish that a law imposes a substantial burden on religious exercise, RFRA only requires courts to determine whether the plaintiff's religious claims reflect an " 'honest conviction' " and whether the consequences of violating the law are significant. *Id.* at 2779 (quoting *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707 (1981)). In *Hobby Lobby,* this Court concluded that "[b]ecause the contraceptive mandate forces [plaintiffs] to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Id.*

In *Holt v. Hobbs*, this Court reaffirmed that judges have no role in questioning the merits of a religious individual's sincerely held beliefs. 135 S. Ct. 853 (2015). The Court refused to consider various theological arguments as to why requiring a Muslim prisoner to shave his beard did not constitute a substantial burden on his religious exercise. *Id.* at 862–63. A lower court in that case had found that the prisoner's religious exercise was not substantially burdened by the prison's beard policy because "his religion would 'credit' him for attempting to follow his religious beliefs," he exercised his religion in other manners, and other Muslim men were willing to shave. *Id.* This Court rejected each of those arguments, noting that the burden was substantial because "if petitioner contravenes that policy and grows his beard, he will face serious disciplinary action." *Id.* at 862.

This Court should grant certiorari in order to reaffirm the commonsense rule that a law places a substantial burden on religious exercise whenever it imposes a significant penalty on a religious person for refusing to violate a religious dictate.

ii. The Tenth Circuit's Explanation That It Rejected the Plaintiffs' Understanding of the Interplay Between the Law and Their Religious Obligations Is Indistinguishable From Rejecting the Plaintiffs' Understanding of Their Religious Obligations.

The Tenth Circuit attempted to distinguish this case from *Hobby Lobby* and *Holt* by stating that it was evaluating "how the law or policy being challenged actually operates and affects religious exercise" rather than the underlying religious exercise. *Little Sisters*,

2015 WL 4232096, at *19. However, an analysis of the interplay between laws and religious beliefs inevitably requires a court to evaluate the relevant religious beliefs. In order to determine how substantially a law interacts with a religious obligation, a court necessarily has to establish the bounds of both the law and the religious obligation. The question of how a law "affects religious exercise" is precisely the "question that the federal courts have no business addressing . . . ." *Hobby Lobby*, 134 S. Ct. 2751 at 2778.

The decision below illustrates why such an impermissible inquiry is inevitable under the Tenth Circuit's test. The plaintiffs argued that their religion prohibited them from undertaking "any action that would make it appear that they had either provided [sterilizations, contraceptives, and abortifacients] or authorized someone else to provide them." Brief of Appellants at 30, *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, No. 13-1540 (10th Cir. Feb. 24, 2014). They also argued that participating in the Accommodation would "make them morally complicit in sin," "contradict their public witness to the value of life," and "immorally run the risk of misleading others." *Id.* at 18.

The Tenth Circuit found the nuns' arguments "unconvincing" because, in its opinion, complying with the Accommodation would not cause the plaintiffs to transgress the religious prohibitions they cited. *Little Sisters*, 2015 WL 4232096, at *29. The court listed several reasons for this conclusion. In each instance, the court claimed that it was merely interpreting the regulation, but each reason required it to reach philosophical and theological conclusions as well as legal ones.

The court held that complying with the Accommodation would not cause the plaintiffs to transgress the prohibition on complicity because, "the purpose and design of the accommodation scheme is to ensure that plaintiffs are not complicit . . . ." *Id.* This explanation only supports the conclusion that the petitioners are mistaken about their complicity if, as a theological matter, the Accommodation achieved the goals it was allegedly intended and designed to accomplish.

Regardless of the government's intent, an accommodation telling Orthodox Jewish prisoners that they can shave with electric shavers rather than traditional razors would not lessen the burden on the prisoners' religious exercise if the particular electric shavers also fell into the prohibited category. Rabbi Moshe Heinemann, *Electric Shavers*, STAR-K ONLINE, goo.gl/Vjw4yu (last visited Aug. 16, 2015). After all, RFRA expressly protects religious exercise from laws that unintentionally burden such religious exercise. 42 U.S.C. § 2000bb-1. Determining whether the Accommodation accomplished its alleged aims necessarily required the court to reevaluate the plaintiffs' sincerely held religious beliefs.

The court stated that the plaintiffs do not risk misleading others by complying with the Accommodation, since doing so is a form of objection. *Little Sisters*, 2015 WL 4232096, at *29. This conclusion requires the court to determine the level of risk that is religiously permissible. If Catholic nuns believe that even a small or theoretical risk is religiously impermissible, judges are in no position to contradict them.

Orthodox Jews observe similar prohibitions against creating the appearance of religious impropriety. Those prohibitions apply even in situations where

judges might determine that there is little risk of misleading others. According to the Talmud, a collection of rabbinic commentary on Jewish law, the prohibition against acting in a manner that may mislead others applies even in the privacy of one's home. Babylonian Talmud, Sabbath 64b.

The court also found that the Accommodation does not impose a substantial burden because it allows the plaintiffs to continue speaking out against the regulation. *Little Sisters*, 2015 WL 4232096, at *29. This is no different than the suggestion in *Holt* that the religious burden was insubstantial because the prisoner could pursue his religious exercise through alternative means. *Holt*, 135 S. Ct. at 862. This Court rejected that argument in *Holt*, and there is no reason to accept it here.

The decision below held that the "*de minimis*" and "minimal" nature of the tasks required by the Accommodation meant that it could not substantially burden the plaintiffs' religious exercise. *Little Sisters*, 2015 WL 4232096, at *30. In doing so, the court equated the amount of effort required to perform a task with its religious significance. There is no basis for such a conclusion, even if a court could permissibly consider such a question.

Indeed, to an Orthodox Jew, many effortless tasks such as turning on a light on Saturday, wearing a garment made of wool and linen, or shaving with a razor are violations of biblical commandments. The correlation, if any, between the amount of effort required to complete a task and its religious significance is a theological decision rather than a legal one.

iii. Requiring a Religious Individual To Undertake an Administrative Task Prior To Exercising His Religion Is Distinct From Requiring Him To Undertake an Administrative Task That Is Itself Prohibited by His Religion.

The Tenth Circuit conflated requiring an individual to undertake a *de minimis* administrative task prior to engaging in a religious exercise with requiring that individual to engage in an administrative task which itself constitutes a grave violation of his religious obligations. *Id.* at *30, *32. A religious person can hardly be said to take advantage of an accommodation when it is the accommodation itself that violates his religious liberty.

Requiring an Orthodox Jewish prisoner to fill out a form requesting kosher food likely would not constitute a substantial burden, since it only requires him to undergo a minor administrative task prior to exercising his religion. However, requiring that same prisoner to fill out the exact same form on Saturday would impose a substantial burden, since writing constitutes a desecration of the Sabbath. Rules that require a religious person to take an action that violates his religion or face significant consequence constitute substantial burdens, no matter how *de minimis* that action might appear to a religious outsider.

C. Deferring To a Religious Adherent's Understanding of His Religious Beliefs Does Not Necessarily Exempt Him from a Law. It Merely Shifts the Burden To the Government To Demonstrate That the Law Is Necessary To Further a Compelling Government Interest.

Once a court accepts that a law substantially burdens a person's religious exercise, the government can defend the law at issue by showing that it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

This is the stage of a case where courts should consider the type of arguments presented by the court below. Perhaps the actions required by the Accommodation are so minimal that there is no less restrictive way for the government to satisfy its aims.[2] If that is the case, the government may be able to carry its burden. However, courts should not avoid making those determinations by dismissing religious people's sincerely held beliefs as insubstantial.

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[2] This is unlikely given this Court's order in *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014), but this brief takes no position on the ultimate disposition of that question.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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